No. 92-757 and No. 92-938

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BARBARA LANDGRAF,
Petitioner,
v.
USI FILM PRODUCTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MAURICE RIVERS AND ROBERT C. DAVISON,
Petitioners,
v.
ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE NATIONAL WOMEN'S LAW CENTER, THE WOMEN'S LEGAL DEFENSE FUND,

(Additional *Amici* Listed on Inside Cover)

AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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LEGAL ADVOCACY FUND,
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AMERICANS FOR DEMOCRATIC ACTION,
CALIFORNIA WOMEN'S LAW CENTER,
CENTER FOR WOMEN POLICY STUDIES,
COALITION OF LABOR UNION WOMEN,
EQUAL RIGHTS ADVOCATES, INC.,
FEDERALLY EMPLOYED WOMEN, INC.,
FEMINIST MAJORITY FOUNDATION,
JAPANESE AMERICAN CITIZENS LEAGUE,
NATIONAL COMMITTEE ON PAY EQUITY,
NATIONAL COUNCIL OF JEWISH WOMEN,
NATIONAL COUNCIL OF NEGRO WOMEN, INC.,
NATIONAL ORGANIZATION FOR WOMEN,
NOW LEGAL DEFENSE AND EDUCATION FUND,
NATIONAL WOMEN'S CONFERENCE COMMITTEE,
NATIONAL WOMEN'S PARTY,
NORTHWEST WOMEN'S LAW CENTER,
PEOPLE FOR THE AMERICAN WAY,
U.S. SECTION OF THE WOMEN'S INTERNATIONAL
LEAGUE FOR PEACE & FREEDOM,
WOMEN EMPLOYED,
WOMEN'S LAW PROJECT, AND
YWCA OF THE U.S.A.

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AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

INTEREST OF THE *AMICI CURIAE*

Amici curiae are 26 women's rights, civil rights, civil liberties, religious, and labor organizations that share a strong commitment to the eradication of all forms of discrimination in the workplace, including sexual and racial harassment. A number of the *amici* were substantially involved in presenting evidence to Congress of the need for the remedial legislation that became the Civil Rights Act of 1991, and all of the *amici* desire to present their perspective on these two extremely important cases.[1]

Congress passed the Civil Rights Act of 1991 in order to restore and strengthen federal civil rights protections, particularly as they pertain to discrimination in employment. The issue presented here is whether that statute applies to cases pending at the time of enactment. This Brief will not restate the analysis of the statute and its legislative history presented by the petitioners. Rather, it will focus upon the special concerns of Congress in addressing the evils of invidious discrimination in the work-

[1] The petitioners and respondents in both cases have consented to the filing of this Brief, and copies of the parties' consent letters have been filed with the Clerk. Appended to this Brief are statements of the individual organizations that have joined as *amici curiae*.

place, particularly the sexual harassment of working women, and upon the determination of Congress to ensure that adequate and effective remedies are available to all victims of such intentional discrimination.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1991 ("the Act" or "the 1991 Act"), Pub. L. No. 102-166, 105 Stat. 1071, was passed by an overwhelming bipartisan majority of Congress, and signed into law by President Bush on November 21, 1991.[2] As confirmed by the congressional statements of findings and purpose and by the statute's legislative history, the Act was a remedial measure designed to close certain significant gaps in two principal civil rights laws, Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981 ("Section 1981").

In particular, the Act was intended to ensure that adequate remedies are available to compensate victims of invidious discrimination in the workplace. As Congress found, the subjection of employees to sexual, racial and/or other similar forms of harassment is a pervasive problem in our society, one that causes significant psychological, financial and often physical harm to its victims, as well as a loss of worker-productivity. Congress also found that, while such intentional discrimination is plainly proscribed by Title VII, the pre-Act unavailability of compensatory and punitive damages under Title VII often left victims of harassment without any effective remedy for the violation of their right to work in an environment free of such conduct. And although victims of racial harassment and other racially discriminatory employment conditions had previously been able to obtain compensation under Section 1981 for such intentional wrongdoing, this avenue of relief was foreclosed by the decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989).

[2] The Act was passed in the Senate and the House by votes of 93-5 and 381-38, respectively. *Congressional Quarterly Almanac*, Vol. XLVII, 31-S and 94-H (1991).

In order to rectify this situation, the Civil Rights Act of 1991 provides for compensatory and punitive damages (within certain monetary limits) for the intentional violation of Title VII, and amends Section 1981 to make clear that the latter statute prohibits, *inter alia*, discrimination on the basis of race in all aspects of an employment relationship. The Act expressly states (in Section 402(a)) that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."

The sole issue presented in the instant cases is whether the Act applies to cases pending on its date of enactment. *Amici* respectfully submit that this question is answered in the affirmative by the plain language of Section 402(a), for the reasons set forth by the Ninth Circuit in *Reynolds* v. *Martin*, 985 F.2d 470 (9th Cir. 1993), and that this Court's inquiry should end there. *Amici* further submit, for the reasons discussed below, that the same conclusion is also required by long-standing judicial authority that permits—indeed obligates—the federal courts to provide an adequate remedy for the violation of federally-protected rights, absent an explicit prohibition of the remedy by Congress. *See, e.g., Franklin* v. *Gwinnett County Pub. Schools*, 112 S. Ct. 1028 (1992); *Bell* v. *Hood*, 327 U.S. 678 (1946). In this case, not only does no such limitation of remedies exist, but the Act demonstrates the intent of Congress that all necessary remedies be available to rectify intentional discrimination in the workplace. For these reasons, there is no need for this Court to engage in traditional "retroactivity" analysis. However, even assuming, *arguendo*, the relevance of such analysis, precedent of this Court compels the conclusion that the Civil Rights Act of 1991 applies to pending cases. *See, e.g., Bradley* v. *School Bd. of City of Richmond*, 416 U.S. 696 (1974).

A contrary holding would continue to subject a plaintiff such as petitioner Barbara Landgraf to the situation in which a federal court found that she had "suffered significant sexual harassment," *Landgraf* v. *USI Film*

Products, 968 F.2d 427, 429 (5th Cir. 1992), but no remedy was available for that egregious and intentional violation of federal law. Congress appropriately has determined that this situation is intolerable in a society that is striving for equality of treatment in the workplace, and there is no justifiable basis upon which that situation should be perpetuated by this Court.

ARGUMENT

I. THE CIVIL RIGHTS ACT OF 1991 WAS SPECIFICALLY INTENDED TO PROVIDE ADEQUATE REMEDIES TO VICTIMS OF SEXUAL HARASSMENT AND OTHER FORMS OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT

The Civil Rights Act of 1991 contains two significant remedial measures regarding invidious discrimination in employment. In Section 102 (codified at 42 U.S.C. § 1981a), the Act provides compensatory and punitive damages for the intentional violation of Title VII. And in Section 101 (which amends Section 1981 to make clear, in light of *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1969), that the statute prohibits race discrimination in all aspects of an employment relationship), the Act effectively restores the availability of the remedies of Section 1981 to victims of discriminatory conduct that continued to be unlawful under Title VII after *Patterson*.

In each instance, Congress was responding to overwhelming evidence that the remedies available in cases of intentional discrimination in employment were inadequate to redress the injuries caused by such discrimination. As an examination of the evidence presented to Congress demonstrates, these remedial deficiencies became most apparent to Congress in cases of sexual harassment, a form of discrimination that typically results in non-wage injuries that could not adequately be remedied by the equitable relief to which the courts had been limited under Title VII. Although the remedial issues considered by Congress certainly involved cases of

discrimination other than harassment, Congress found the inequities caused by the failure of existing remedies in harassment cases to be particularly persuasive of the need to expand those remedies. A review of the legislative record demonstrates that passage of the 1991 Civil Rights Act was driven in pertinent part by the response of Congress to such cases and its consequent determination to ensure the availability of adequate remedies to all victims of intentional discrimination in employment.

A. Title VII And Section 1981 As Previously Interpreted Were Inadequate To Redress Sexual Harassment And Other Forms Of Invidious Discrimination In Employment

The subjection of female workers to sexual harassment pervades our society; studies have shown that approximately 50% to 80% of women have experienced sexual harassment on the job. Matthew C. Hesse & Lester J. Hubble, Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 Washburn L.J. 574 (1985) (hereafter "*Dehumanizing Puzzle*"), at 575.[3] The great harms caused by sexual harassment—to the employers as well as to the victims—cannot be overem-

[3] Between 1980 and 1988, more than 38,500 sexual harassment cases were filed with the EEOC. *See* H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 40 n.29 (1990). This figure surely underrepresents the number of actual incidents; according to Women Employed, a Chicago-based organization that has advised and assisted thousands of women with employment discrimination problems, "approximately 80 percent [of the women whom they counsel] choose not to file discrimination charges, primarily because it just does not seem worth it." *The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess., Vol. 2 at 19 (1990) (statement of Nancy Kreiter). The problem is not confined to the private sector; according to a 1988 U.S. Merit Systems Protection Board survey, 42% of women working for the federal government reported that they had experienced sexual harassment in the two years prior to the survey. *See* H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 40 n.29 (1990).

phasized. A recent survey of 160 "Fortune 500" companies, for example, showed an average company loss of $6.7 million per year in decreased productivity, increased absenteeism and higher employee turnover caused by sexual harassment. James G. Frierson, *Sexual Harassment in the Workplace Costly in Production, Absenteeism, Turnover*, 8 Preventive L. Rep. 3, at 3 (June 1989). Victims of harassment experience personal degradation and humiliation, anxiety, stress, nervousness, depression, and loss of self-esteem, and suffer physical problems such as nausea, insomnia, headaches, loss of appetite and high blood pressure. *See* Sharon T. Bradford, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 Yale L.J. 1611 (1990) (hereafter "Bradford"), at 1615; *Dehumanizing Puzzle, supra*, at 575 & n.9; and cases discussed *infra* pp. 10-16.

Nonetheless, despite the very real and tangible injuries caused by harassment, the civil rights laws have proven inadequate to remedy those injuries. Historically, Title VII has been interpreted by the courts as providing only equitable relief (*e.g.*, injunctions, back pay and reinstatement) but not legal relief (*e.g.*, compensatory and punitive damages) to remedy a violation. *See, e.g., Curran* v. *Portland Superintending Sch. Comm.*, 435 F. Supp. 1063, 1078 (D. Me. 1977).[4] While so-called "equitable" relief generally has been sufficient to remedy the wage-related consequences of discrimination, it has

[4] The view that compensatory and punitive damages were not available under Title VII (§ 706(g), 42 U.S.C. § 2000e-5(g)) was not universal, however. *See, e.g., Humphrey* v. *Southwestern Portland Cement Co.*, 369 F. Supp. 832 (W.D. Tex. 1973) (compensatory damages available), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974); *Tooles* v. *Kellogg Co.*, 336 F. Supp. 14 (D. Neb. 1972) (punitive damages may be available). *See also* Bradford, *supra*; Michael J. Goldberg, Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 Harv. Civ. R.-Civ. Lib. L. Rev. 325, 330-34 (1974). Since the 1991 Civil Rights Act (42 U.S.C. § 1981a) expressly provides for damages in Title VII cases, the issue of whether Title VII previously should have been interpreted to include legal relief is now, of course, academic.

proven inadequate to deal with the consequences of invidious harassment and other non-wage-related injuries. The unavailability of compensatory and punitive damages under Title VII has left the victims of sexual harassment with no remedy at all for the types of non-wage injuries caused by such discrimination. *See generally* Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1464-65 (1984); Bradford, *supra*, at 1613-19. This unavailability of adequate remedies was described by Senator Kennedy, a principal sponsor of the 1991 Civil Rights Act, as "one of the most serious loopholes in existing law." 137 Cong. Rec. S15234 (daily ed. Oct. 25, 1991). *Accord* 137 Cong. Rec. S15490 (daily ed. Oct. 30, 1991) (statement of Sen. Durenberger terming the inadequacies of Title VII's remedies a "gigantic loophole in our discrimination laws").

The sexual harassment case at bar epitomizes the inadequacy of the equitable remedies to which Title VII plaintiffs have been restricted. Barbara Landgraf, a machine operator at a production plant, was subjected at work to "continuous and repeated inappropriate verbal comments and physical contact," as the trial court determined and as the respondents herein did not dispute at trial. *Landgraf*, 968 F.2d at 429, 432. Ms. Landgraf resigned and sued her employer under Title VII. However, because the trial court concluded that the resignation was not itself the result of discrimination, Ms. Landgraf received no equitable relief (such as back pay). *Id.* at 429-32. And even though Ms. Landgraf was the adjudicated victim of an intentional and undisputed violation of Title VII, she received no compensation for the humiliation and suffering caused by that violation—the harassment itself.

Barbara Landgraf's plight has been all too common. As Congress learned in considering the legislation that became the 1991 Civil Rights Act, *see infra* pp. 10-16, the unavailability of an adequate remedy for sexual harassment under Title VII created a class of persons whose

federal rights unquestionably had been violated but who could not obtain adequate relief for that violation. Employees who were subjected to a similar evil—racial harassment—fared no better under Title VII. *See, e.g., Williams* v. *Atchison, Topeka & Santa Fe Ry.*, 627 F. Supp. 752 (W.D. Mo. 1986) (African American male employee who was forced to endure racial slurs and "jokes" such as posting of Ku Klux Klan application on company bulletin board received judgment that employer had violated Title VII but was awarded no damages under Title VII for his resulting emotional and psychological problems, a situation the court "regretted").

Section 1981 historically has offered more expansive remedies to victims of race discrimination than has Title VII, including compensatory and punitive damages. *See, e.g., Johnson* v. *Railway Express Agency*, 421 U.S. 454, 460 (1975). *See also The Civil Rights Act of 1990: Hearing on S. 2104 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. (1990) (hereafter "*Civil Rights Act 1990 Senate Hearing*"), at 160-65 (statement of Prof. Eleanor Holmes Norton). However, this Court's decision in *Patterson* v. *McLean Credit Union* terminated the right of plaintiffs to sue under that statute for race discrimination involving the conditions of employment (such as racial harassment), as distinct from discriminatory practices in the creation of the employment contract itself. The combination of *Patterson* and the limited remedies then allowed under Title VII thus meant that victims of certain forms of intentional race discrimination in employment likewise had no adequate remedy for that wrongdoing.[5]

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[5] As of 1990, more than 200 claims of race discrimination had been dismissed by the federal courts as a result of the *Patterson* decision. S. Rep. No. 315, 101st Cong., 2d Sess. 13 (1990) (citing statement of Julius Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.). *See also* Women's Legal Defense Fund, *The Unjust Workplace: The Impact of the Patterson Decision on Women* (reprinted in *The Civil Rights Act of 1991:*

B. Congress Passed The 1991 Civil Rights Act Upon An Extensive Record Demonstrating The Remedial Inadequacies Of The Civil Rights Laws

In response to *Patterson* and several other decisions of this Court "that sharply cut back on the scope and effectiveness of these important federal laws" (*i.e.*, Title VII and Section 1981), *see* H.R. Rep. No. 40 Part II, 102d Cong., 1st Sess. 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, at 694, and in response to the remedial inadequacies of Title VII, Congress undertook to amend those statutes. In considering the proposed legislation that ultimately became the Civil Rights Act of 1991, Congress heard testimony from, *inter alia*, numerous individuals who had been sexually harassed at work in violation of Title VII, and/or who had been victimized by race discrimination in employment, yet who had received no compensation for the injuries that they had suffered as a consequence of that intentional wrongdoing. Many of these witnesses presented facts that had been adjudicated by federal courts as constituting intentional discrimination in violation of federal law. The painful testimony that they gave before Congress was a ringing indictment of the inadequacies of the laws to remedy such discrimination, and formed the basis on which Congress then acted.

1. *Sexual harassment*

For example, Carol Zabkowicz, a warehouse worker with the West Bend Company in Oak Creek, Wisconsin, described the vicious sexual harassment to which she had been subjected at work:

> My co-workers would constantly pull on my bra straps. One of my co-workers left a handwritten poem on my desk regarding my sex life with my husband. Another man would often call me a "sexy bitch" or "H and H," which I discovered meant "Hot and Horny." Still another would grab his penis in front of me and ask me if I could handle his "25 pounder." He would also call out to me. When I looked in his direction, he would be standing with his buttocks exposed.
>
> Another man also exposed his buttocks to me, and on occasion, would lift up the leg of the cutoff shorts he was wearing, call my name, and expose his testicles to me. This same man made a huge cardboard cutout of a penis, with which he would pretend to poke me in the buttocks when my back was turned.
>
> Yet another man would post drawings of caricatures of myself. These drawings would depict me naked, often performing sexual acts with either a human being or an animal. My initials would be written on the drawings.
>
> Because I knew these acts were wrong, I repeatedly reported this outrageous behavior to my immediate supervisor and my manager, but to no avail. . . . During this time, my emotional and physical health suffered. I was anxious, nervous, had poor concentration and cried easily. I suffered vomiting, severe nausea, diarrhea and cramping. My doctor testified at my trial that I suffered from a gastrointestinal disorder as a result of the harassment at work, and the judge accepted this as fact.
>
> In 1982, when I was pregnant with my second child, the harassment was still going on. My health continued to decline, and I started to lose weight. My OB-GYN, who was aware of my horrendous working conditions, told me that for the sake of my health, and the health of the child that I was carrying, I had to take a medical leave of absence from work, and I did this.

The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the

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***Hearings on H.R. 1 Before the House Comm. on Education and Labor*, 102d Cong., 1st Sess. 770-92 (1991)).**

House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) (hereafter *"Civil Rights Act 1990 House Hearings"*), Vol. 2 at 3-4.

A federal court found that Ms. Zabkowicz had been subjected to "a campaign of abuse" and "sustained, malicious, and brutal harassment." *Zabkowicz* v. *West Bend Co.*, 589 F. Supp. 780, 782, 784 (E.D. Wis. 1984), *aff'd in part and rev'd in part on other grounds*, 789 F.2d 540 (7th Cir. 1986). The court also found that despite Ms. Zabkowicz's repeated complaints about this unconscionable treatment, her employer for years "never conducted an investigation or disciplined a single employee," and held the employer liable for sexual harassment under Title VII. 589 F. Supp. at 785. Nonetheless, Ms. Zabkowicz was awarded only $2,763.20—back pay for wages lost during an illness caused by the harassment. *Id.* at 783, 785. Ms. Zabkowicz received no compensation for her medical bills or for her emotional distress. In fact, had she not become so physically ill that she could not work, Ms. Zabkowicz would have received no compensation at all despite having been victimized by intentional and sustained violations of federal law.

The case of Helen Brooms, a 36-year-old African American industrial nurse, was equally revealing of the inadequacies of Title VII. Ms. Brooms, a married mother of three, had been racially and sexually harassed by her supervisor and forced to leave her job as a result of the harassment. As a federal judge found, Ms. Brooms's supervisor had, among other things, made numerous explicit racial and sexual remarks to her and showed her pornographic photographs, including a "photograph depicting an interracial act of sodomy" which the supervisor told Ms. Brooms "showed the 'talent' of a black woman" and depicted the purpose for which she had been hired. *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 416-17 (7th Cir. 1989). In testimony before Congress, Ms. Brooms further described the harassment to which she had been subjected:

> He [the supervisor] told me I was "the best looking piece of ass" at a company party and asked if there was room in my pants for him. . . . He said he wanted to place salt on my genitalia and eat it off. He asked me to smoke marijuana with him for it made him oversexed. He remarked that I needed breast surgery.
>
> While attending an out-of-town conference, my boss propositioned me for sexual favors, described the size of his penis and said black women had, throughout history, borne white men's babies. I was so upset and frightened that as a result, I suffered severe rectal bleeding and required medical attention.

Civil Rights Act 1990 House Hearings, supra, Vol. 2 at 16-17.

The harassment of Ms. Brooms culminated in an incident in which her supervisor showed her a picture depicting bestiality and threatened to kill her if she did not submit to him. Ms. Brooms "ran from him, screaming in terror, and in [her] haste to escape, fell down a flight of stairs" and suffered permanent physical injury. *Id.* at 17. Although Ms. Brooms left her job, the effects of the harassment continued; as Ms. Brooms explained, she "suffered a severe and debilitating depression requiring psychiatric treatment [and] was unable to work." *Id.* Despite all her anguish and pain, Ms. Brooms received only an award of back pay, and this only because the trial court had concluded that the harassment was so severe as to constitute a constructive discharge. *Id.* at 16; 881 F.2d at 417. Ms. Brooms received no compensatory damages for any of the other consequences of the harassment, including her resulting medical bills and emotional distress.

Jacqueline Morris, a machinist at the American National Can Corporation, was similarly left without any remedy for the campaign of sexual harassment conducted against her by her co-workers. As she testified before Congress:

> On more than one occasion, the manager of forming operations for the plant touched my buttocks,

> told me that I "had a nice ass" and that he would "like to have a piece of that";
>
> At one staff meeting I asked my supervisor where I should sit, and he responded by moving my head down while saying something to the effect that "you might as well sit underneath my desk since that's where you do your best work";
>
> On more than one occasion, my immediate supervisor touched my breasts, touched my buttocks, made remarks to me such as "didn't you get any last night," and "do you spit or swallow," and made references to my breasts and buttocks;
>
> Numerous offensive materials were left at my work station, including a clay replica of a penis with steel wool testicles . . . .

The Civil Rights Act of 1991: Hearings on H.R. 1 Before the House Comm. on Education and Labor, 102d Cong., 1st Sess. (1991) (hereafter *"Civil Rights Act 1991 House Hearings"*), at 124.

After exhausting all internal grievance procedures, Ms. Morris filed a charge of discrimination with the EEOC, yet the harassment escalated. As she explained to Congress:

> At various times, I found the words "bitch," "slut," "whore" and "Jackie blows head" written on my desk or near my work station;
>
> A picture which showed a nude woman touching her breasts was left at my work station with a note that said "you should be doing this instead of [a] man's job";
>
> A substance which smelled like urine was put in the air line of my air compressor;
>
> A semen-like substance was left on the chair at my workbench.

Id. at 125.

As a result of the abuse, Ms. Morris suffered from breathing difficulties, nervousness, sleeplessness, and blotches and welts on her legs and back, all of which subsided whenever she took time off from work. Ultimately, a federal court found her employer liable for sexual harassment in violation of Title VII. *Morris* v. *American Nat'l Can Corp.,* 730 F. Supp. 1489 (E.D. Mo. 1989), *aff'd in part and rev'd in part on other grounds,* 941 F.2d 710 (8th Cir. 1991). Despite this violation of her federal rights—the details of which the Eighth Circuit called "sordid and egregious," 941 F.2d at 712—Ms. Morris received only retroactive seniority and back pay with interest for the work that she had missed, and nothing for the pain, suffering, humiliation, and health-related problems that she had endured. 730 F. Supp. at 1497-98.

The case of Patricia Swanson, another victim of sexual harassment, provided perhaps the most compelling example not only of the inadequacy of Title VII's remedies but also of the egregious and absurd results of that inadequacy when carried to its inevitable conclusion. As Ms. Swanson reported to Congress, the supervisor at the car dealership where she worked as an assistant finance manager had repeatedly made lewd, offensive and embarrassing comments to her, sometimes in the presence of other employees, had repeatedly attempted to unhook her bra, had run his hand up her skirt and grabbed her between her legs, had pulled down his pants and stood naked in front of her, and had repeatedly threatened that he would make her have sex with him. *Civil Rights Act 1990 Senate Hearing, supra,* at 186-88. This conduct caused Ms. Swanson to feel "like [she] was a prisoner in [her] own office . . . [and caused her migraine headaches] so bad [she] almost passed out." *Id.* at 188. Ms. Swanson was subsequently discharged.

Although Ms. Swanson filed suit, the response of the federal courts to the concededly unlawful conduct to which she had been subjected only served to compound

her suffering. Even though the trial judge found, and the Court of Appeals agreed, that Ms. Swanson had been sexually harassed, Ms. Swanson was awarded no relief because the courts concluded that she had been discharged for reasons unrelated to the harassment. And since no compensatory or punitive damages were available under Title VII to remedy the harassment, the defendant was considered to be the prevailing party and Ms. Swanson was ultimately ordered to pay the defendant's court costs. *Id.* at 188-89. *See Swanson* v. *Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989) ("since Swanson cannot recover any award under Title VII, [the defendant] must receive judgment even if there has been a violation of that statute"), *cert. denied*, 493 U.S. 1036 (1990).

In sum, and as stated to Congress by the American Bar Association, Title VII left "many victims of employment discrimination without remedies for their proven injuries and allow[ed] certain employers who discriminate to avoid any meaningful liability." *Civil Rights Act 1990 House Hearings, supra*, Vol. 1 at 533.

2. *Race discrimination*

As Congress further heard, victims of intentional race discrimination suing under Section 1981 fared no better after *Patterson*. For example, in the case of Bunny Kishaba, a woman of Hawaiian-Chinese ancestry who had been employed as an executive secretary for Hilton Hotels in Hawaii and who had sued Hilton for race discrimination, it was

> undisputed that [Kishaba's supervisor] McDonough made many derogatory and discriminatory remarks about various ethnic groups . . . . McDonough referred to a Japanese person as a "Jap" and compared local people to "the spics in New York," stating that locals are "not capable of being supervisors" and are "incompetent." . . . Kishaba witnessed racist behavior of a more subtle kind. When a Jewish group attempted to contact the executive office, McDonough told her to have D'Rovencourt take care of it because "he's our resident." She asserts that there was no doubt from his manner that he meant "resident Jew." . . . McDonough told her . . . "in a contemptuous way" that "I have to have the only secretary who does the hula." Additionally, McDonough frequently used the term "you people" in such phrases as "what's the matter with you people" or "if you people don't shape up, I'll get rid of all of you." Kishaba states that "there was no doubt whatever" that his references to "people" were to local Asians and Hawaiians.

Civil Rights Act 1990 House Hearings, supra, Vol. 1 at 176-77 (quoting *Leong* v. *Hilton Hotels Corp.*, 50 F.E.P. Cas. 738, 739 (D. Haw. 1989)). Nonetheless, the court held that, after *Patterson*, Ms. Kishaba's claim of racial harassment was no longer actionable under Section 1981. *Leong*, 50 F.E.P. Cas. at 741.[6]

The court in Ms. Kishaba's case also held that she could not obtain compensatory or punitive damages under Title VII, 50 F.E.P. Cas. at 741, thus underscoring the devastating effect that *Patterson* had, particularly on women of color victimized by harassment, by its elimination of an alternative to Title VII's inadequate remedies. This harsh reality was brought home to Congress by the evidence presented during the hearings on the 1991 Act. *See, e.g., Civil Rights Act 1991 House Hearings, supra*, at 770-92 (reprinting Women's Legal Defense Fund, *The Unjust Workplace: The Impact of the Patterson Decision on Women*).

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[6] *See also Civil Rights Act 1990 House Hearings, supra*, Vol. 1 at 177-78, discussing *Dangerfield* v. *Mission Press*, 50 F.E.P. Cas. 1171 (N.D. Ill. 1989), in which the court held that "contemptible" racist conduct to which the plaintiff employees allegedly had been subjected was not actionable under Section 1981 after *Patterson*.

3. *The response of Congress*

The witnesses who appeared before Congress were only a few of the many individuals who have been victimized by egregious and intentional acts of discrimination in violation of Title VII and/or Section 1981, yet who have received little or no compensation for their injuries.[7] Having heard from those victims, as well as from civil rights leaders, elected officials, and members of the academic and business communities, Congress realized the magnitude of the inequities caused by the remedial gap in Title VII and by *Patterson*.[8]

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[7] *See, e.g.*, National Women's Law Center, *Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy* (1991) and cases collected therein (reprinted in *Civil Rights Act 1991 House Hearings, supra*, at 581-629); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal. L. Rev. 775 (1991) (offering additional case accounts).

[8] The remedial inadequacies of the civil rights laws were communicated to Congress by a wide variety of people and groups. *See* H.R. Rep. No. 40 Part I, 102d Cong., 1st Sess. 17-18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 555-56; *Civil Rights Act 1990 House Hearings, supra*, Vol. 2 at III-IV; *Civil Rights Act 1990 Senate Hearing, supra*, at III-VI. The need for strengthening Title VII's remedies had also been recognized by officials of government agencies involved in equal employment issues and by legal commentators. *See, e.g.*, Clarence Thomas, *Discrimination and Its Effects*, 21 Integrated Education 204 (1983) (arguing that "equitable remedies available under Title VII are not as compelling as the civil damages available under other federal statutes" and suggesting a need for more effective remedies); and authorities cited *supra* p. 7.

In addition, a number of federal courts had also recognized the failure of Title VII's "equitable" remedies. *See, e.g., Beesley* v. *Hartford Fire Ins. Co.*, 723 F. Supp. 635, 647 (N.D. Ala. 1989) (the lack of compensatory and punitive damages as a remedy makes "a Title VII sexual harassment claim, as a practical matter, meaningless"); *Stewart* v. *Thomas*, 538 F. Supp. 891, 897 (D.D.C. 1982) ("[t]o the extent that Title VII fails to capture the personal nature of the injury done to this plaintiff as an individual, the remedies provided by that statute fail to appreciate the relevant dimensions of the problem in this [sexual harassment] case");

In the 1991 Act, Congress made a reasoned judgment to rectify these inequities through two measures—the restoration of the law under Section 1981 as it had existed prior to *Patterson*, and the provision of compensatory and punitive damages under Title VII. This legislation not only took an important step toward closing the "gigantic loophole" in Title VII (caps were placed on damages), but addressed a serious problem that had particularly confronted women of color. Because of the remedial discrepancies that had existed between Title VII and Section 1981, women of color victimized by employment discrimination had been confronted with a legal system in which employer-defendants endeavored to pigeonhole their claims into a race-based or sex-based box, rather than recognize that such claims were generally inseparable. *See* Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal. L. Rev. 775 (1991); Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 Journal of Legislation 30 (1981). With the 1991 Act, it is less likely that women of color will be subjected to artificial efforts to separate a single individual by race and gender.

By amending Section 1981 and adopting new Section 1981a, Congress sought to put an end to the violation of rights without remedies. This overarching purpose of the 1991 Civil Rights Act—to ensure that victims of invidious discrimination in employment have meaningful legal remedies—was effectively summarized by Senator Leahy, an original co-sponsor of the Act:

Compston v. *Borden, Inc.*, 424 F. Supp. 157, 162 (S.D. Ohio 1976) ("[w]ere compensatory damages available to a Title VII plaintiff, this Court would not hesitate to enter such an award in this case, because it is apparent from the evidence that [the plaintiff] suffered mental anguish and humiliation at defendants' hands").

Under existing civil rights laws, the best a woman who is intentionally harassed in the workplace can hope for from our legal system is a court order saying that her boss should stop. If her boss starts to harass her again, the only thing she can do is go back to court to get yet another order telling her boss to behave. . . . [W]ithout the improvements of the Civil Rights Act of 1991, there would be no penalty for the employer, no adequate compensation for the victim.

* * * *

[And if] . . . an employer intentionally harasses or otherwise persecutes an employee solely on account of race, the current civil rights laws cannot require the employer to compensate that person fully for the damage he has caused, no matter how great or how real. Nor can the employer be forced to pay punitive damages no matter how outrageous his conduct has been. By overturning the Supreme Court's decision in *Patterson* versus *McLean Credit Union*, the Civil Rights Act of 1991 would remedy this injustice.

The penalties for civil rights violations—for depriving citizens of the fundamental principles of equality and fairness on which this Nation was founded—should not be inferior to legal claims for breaching a contract, violating the Sherman Act, or infringing a copyright. This bill goes a long way toward setting this priority straight and *recognizing the importance of protecting all Americans from discrimination by providing a meaningful legal remedy.*

137 Cong. Rec. S15489 (daily ed. Oct. 30, 1991) (emphasis added).[9]

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[9] *See also* 137 Cong. Rec. H9532-33 (daily ed. Nov. 7, 1991) (statement of principal sponsor Rep. Fish noting that Congress is "united in again responding appropriately to the reality of discrimination" by "provid[ing] a necessary remedy [monetary relief] for those who continue to be victimized" and by "effectively overturn[ing] Supreme Court rulings because we cannot ignore the judicial erosion of important protections for women and members of minority groups"); H.R. Rep. No. 40 Part I, 102d Cong., 1st Sess. 64-65 (1991), 1991 U.S.C.C.A.N. at 602-03 ("[m]onetary damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity"); 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991) (statement of principal sponsor Rep. Edwards noting that "[c]ompensatory damages are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental, physical, and emotional health, to their self-respect and dignity, and for other consequential harms" and further stating that "Section 101 fills the gap in the broad statutory protection against intentional racial and ethnic discrimination covered by Section 1981 . . . that was created by the Supreme Court decision in *Patterson*").

Despite the clear purpose of Congress in passing the 1991 Act and the extensive and explicit record on which Congress acted, the respondents in the instant cases would have this Court continue to apply a remedially-deficient civil rights jurisprudence. For the reasons set forth below, this Court should decline that invitation to prolong the injustice that Congress so plainly intended to end.

II. THE FEDERAL COURTS ARE OBLIGATED TO PROVIDE AN ADEQUATE REMEDY FOR THE VIOLATION OF A FEDERAL RIGHT, UNLESS THAT REMEDY IS SPECIFICALLY FORECLOSED BY CONGRESS—WHICH IS NOT THE CASE HERE

The instant cases, if not reversed, would perpetuate the situation in which federal rights can be violated without an adequate remedy being accorded to the victims—the very situation that Congress intended to eradicate by passage of the Civil Rights Act of 1991. This Court should reverse the judgments below based on the long-established principle that a federal court is obligated to ensure an adequate remedy for a violation of federal law, provided that the remedy has not been foreclosed by Congress.

It is well-settled that for every available statutory right there must be an appropriate remedy for a deprivation

of that right. Chief Justice John Marshall stated in 1803 what has been a guiding legal principle ever since: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . '[E]very right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 Blackstone *Commentaries* 109).

This rule guarantees to victims of statutory violations that courts will provide the necessary remedies, particularly when the violations are of federal law. As this Court has stated on repeated occasions:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Bell v. *Hood*, 327 U.S. 678, 684 (1946) (footnotes omitted); *accord Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964).

This Court reaffirmed the vitality of this important and bedrock legal doctrine as recently as last Term. In *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992), the Court held that compensatory damages are available as a remedy in a private action challenging an intentional violation of Title IX of the Education Amendments of 1972 ("Title IX").[10] The Court reached this conclusion by applying the rationale of *Bell* v. *Hood* and its progeny, and stated that damages must be made

[10] The private right of action is not expressly authorized by Title IX but was itself deemed to exist by this Court in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

available because, without them, the federal remedy would clearly be inadequate and would in fact "accord[] . . . no remedy at all." 112 S. Ct. at 1038.

The one exception to the requirement that all appropriate relief be awarded in any action to vindicate a federal right is in those instances in which there exists a clear indication of a contrary legislative intent. As this Court stated in *Franklin*, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." 112 S. Ct. at 1032 (citing *Davis* v. *Passman*, 442 U.S. 228, 246-47 (1979)).

No contrary congressional expression exists here. Whether or not Title VII as originally enacted allowed compensatory and punitive damages, *see supra* note 4, 42 U.S.C. § 1981a now plainly does, and that statute, which is Section 102 of the 1991 Act, contains no bar to its application in pending cases.[11] In *Franklin*, this Court refused to create a remedial bar not imposed by Congress, and it should do the same here. Indeed, given the plain language of 42 U.S.C. § 1981a, the express recognition by Congress of the inadequacy of Title VII's remedies, and the intent of Congress to ensure the availability of compensatory and punitive damages and put an end to cases such as that of Pat Swanson, Helen Brooms—and Barbara Landgraf—it would be highly anomalous for this Court to continue to apply Title VII in a limited remedial manner.[12]

[11] By contrast, *see* Sections 109(c) and 402(b) of the Act (42 U.S.C. § 2000e note and 42 U.S.C. § 1981 note, respectively), which contain express prohibitions on retroactive application of the section of the Act that overturns *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991), and of the entire Act to certain defined "disparate impact cases" (*i.e.*, *Wards Cove Packaging Co.* v. *Atonio*, 490 U.S. 642 (1989)).

[12] Indeed, given the decision in *Franklin*, one court has recently concluded that Title VII itself (as distinct from 42 U.S.C. § 1981a) should be interpreted to allow compensatory and punitive damages. *See Berry* v. *Stevinson Chevrolet*, 804 F. Supp. 121, 136-37 (D. Colo. 1992).

Similarly, Congress recognized that *Patterson* had created an untenable remedial problem for victims of intentional race discrimination in employment. Although the right to a workplace free of such discrimination continued under Title VII after *Patterson*, the comprehensive remedy for a violation of that right provided by Section 1981 was no longer available. Section 1981 as amended by Section 101 of the 1991 Civil Rights Act thus restores those remedies for the violation of rights that existed at all relevant times. Like Section 102 of the Act, Section 101 contains no bar to retroactive application. *Bell* and *Franklin* thus require that Section 1981 as amended by the Act be applied in pending cases so that adequate remedies will be available to victims of intentional race discrimination in employment.

The obligation of the courts to provide an adequate remedy for the violation of an employee's right to a workplace free of invidious discrimination, through the application of 42 U.S.C. § 1981a and Section 1981 as amended by the 1991 Act, is not only required by *Bell* and *Franklin*, but would comport with the goal of the civil rights laws to end "the injustices and humiliations of racial and other discrimination," H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2394, and serve to effectuate the "purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). *Accord Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). As this Court stated in *County of Washington* v. *Gunther*, 452 U.S. 161 (1981), "a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. *We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.*" *Id.* at 178 (emphasis added, citation omitted).

It is undisputed that Barbara Landgraf suffered "significant sexual harassment at the hands of [a co-worker]," *Landgraf*, 968 F.2d at 429, a clear and intentional violation of Title VII, yet she received no relief for the resulting injuries. Similarly, the petitioners in *Rivers* had the remedies previously available to them under law taken from them as a result of this Court's ruling in *Patterson*. Both cases now before this Court involve precisely the type of injustice that Congress sought to rectify with passage of the 1991 Act, *i.e.*, the violation of rights without remedies. (Indeed, the similarities between *Landgraf* and *Swanson* are quite striking.) It would be directly contrary to the teachings of *Bell* and *Franklin* for the Court—in the absence of a clear statutory directive—to refuse to apply the relevant sections of the 1991 Civil Rights Act to pending cases and thus continue to turn away victims of intentional discrimination without affording them adequate relief. And it would be particularly ironic for the Court to do so in a sexual harassment case—the paradigm of what prompted Congress to act.

III. ASSUMING, *ARGUENDO*, THE APPLICATION OF RETROACTIVITY ANALYSIS, PRECEDENT REQUIRES THAT THE CIVIL RIGHTS ACT OF 1991 BE APPLIED TO PENDING CASES

For the reasons discussed above, *Bell* v. *Hood* and its progeny compel the application of the Civil Rights Act of 1991 to pending cases so that prevailing plaintiffs may be afforded a remedy for the violation of their federally-protected rights. Thus, these cases do not implicate traditional "retroactivity" analysis. However, assuming, *arguendo*, that this Court determines to apply such analysis, *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974), requires that the Civil Rights Act of 1991 be applied to cases pending at the time of enactment.

In *Bradley*, a unanimous Court (with two Justices not participating) held that a statute granting the federal courts the authority to award reasonable attorneys' fees in school desegregation cases applied to counsel's services rendered prior to enactment of the statute. The Court noted that its holding was "anchor[ed] . . . on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711.[13]

With respect to the 1991 Civil Rights Act, neither of these two exceptions to the *Bradley* rule exists. As the Briefs of the petitioners demonstrate, there is no "statutory direction or legislative history" that requires the prospective application of the Act except with respect to certain specific sections not at issue here. *See supra* note 11. To the contrary, and for the reasons set forth in *Reynolds* v. *Martin*, 985 F.2d 470, the plain language of the Act requires that the statute be applied to pending cases, except as otherwise expressly provided, which should end the inquiry.

Assuming, *arguendo*, that one disagrees with *Reynolds*, the most that can be argued in favor of a prospective application of the Act based on the statute and its legislative history is that they are ambiguous as to that issue; even the courts that have held the Act to be prospective

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[13] While an "apparent tension" has been observed between *Bradley* and the subsequent opinion in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988) (*see Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 837 (1990)), *Bowen* in fact involved the potential retroactivity of an administrative rule, and its holding turned on the agency's lack of authority to adopt retroactive rules. By contrast, *Bradley* and the instant cases involve civil legislation duly enacted by the Congress of the United States, which plainly does have the authority to enact retroactive civil statutes. In any event, further analysis of this issue is beyond the scope and purpose of this Brief *amici curiae*, and *amici* respectfully refer the Court to the Briefs of the petitioners on this issue.

only have had to concede this—including the courts in the two cases now before this Court. *See, e.g., Harvis* v. *Roadway Express, Inc.*, 973 F.2d 490, 496 (6th Cir. 1992) (referring to the Act's "ambiguous legislative history and language"); *Landgraf*, 968 F.2d at 432 ("there is no clear congressional intent on the general issue of the Act's application to pending cases"). Under *Bradley*, an ambiguous legislative history that can be read as supportive of either retroactivity or prospectivity provides "at least implicit support for the application of the statute to pending cases," 416 U.S. at 716, and is not a bar to such application. Thus, the exception to the *Bradley* norm of retroactivity based on a congressional directive of prospectivity is inapplicable here.

The other exception to the *Bradley* rule—manifest injustice—is equally inapplicable. The *Bradley* Court articulated a three-part test as a guide in determining "the possible working of an injustice" in the application of a new statute to pending cases; that test examines "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. An application of that test in the instant cases confirms that no "manifest injustice" would result from holding the Act applicable in these cases.

First, while these cases technically involve disputes between private parties, Title VII and Section 1981 are intended to create a society free of invidious discrimination. Plaintiffs who successfully sue under these statutes thus advance important federal goals, and are therefore considered to be acting as private attorneys general in effectuating those goals. *See, e.g., Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978) (Title VII plaintiff "is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority' " (citation omitted)); *Brown* v. *Culpepper*, 559 F.2d 274, 277-78 (5th Cir. 1977) (Section 1981). It is significant to note that in *Bradley* itself, this Court recog-

nized the public importance of school desegregation cases in part by comparing them with suits brought to enforce the Civil Rights Act of 1964 (of which Title VII is a part), noting that private litigation is a necessary means of securing broad compliance with such laws. 416 U.S. at 719.

Like the school desegregation statute at issue in *Bradley*, Title VII and Section 1981 involve "great national concerns" and must therefore be decided "according to existing laws." *Bradley*, 416 U.S. at 719 (citing *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). Thus, application of the first part of the *Bradley* "injustice" test favors retroactivity.

The second part of that test likewise provides no support for prospectivity, since application of the 1991 Civil Rights Act to pending cases would not "infringe upon or deprive a person of a right that had matured or become unconditional." *Bradley*, 416 U.S. at 720. Simply put, no one has a right to violate federal law, and federal law at all relevant times has prohibited invidious discrimination in employment. As Congress recognized in 1990, "[t]wenty-six years after Title VII of the Civil Rights Act of 1964 was enacted . . . [v]irtually everyone in America now understands that it is both 'wrong' and 'illegal' to discriminate intentionally." H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 9 (1990). The hostile work environment to which Barbara Landgraf was subjected unquestionably violated Title VII, as the lower courts found. And the discriminatory conduct of the respondent in *Rivers* as alleged violated both Title VII and Section 1981 as then interpreted by the courts.[14]

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[14] It should be kept in mind that hundreds of pending Section 1981 cases were dismissed by the lower courts *and jury awards in favor of plaintiffs* overturned following this Court's decision in *Patterson*, although the conduct at issue in those cases was recognized to be unlawful under Section 1981 (and Title VII) prior to that decision. *See supra* note 5; H.R. Rep. No. 644 Part 1, 101st Cong., 2d Sess. 18 (1990); *Civil Rights Act 1990 House Hearings, supra*, Vol. 3 at 311-14 (statement of Patricia Carroll). Given the courts' retroactive application of *Patterson* to pre-*Patterson* conduct and cases, it would be most ironic and unjust for the corrective legislation not to be applied in the cases of numerous plaintiffs who would otherwise be caught in a judicially-created remedy gap, and it would create a windfall for defendants who had intentionally engaged in discriminatory conduct understood to be unlawful.

The final prong of the "injustice" test examines the "possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley*, 416 U.S. at 720. This concern is not implicated here for the very reasons set forth by this Court last Term in *Franklin* v. *Gwinnett County*. In its ruling that compensatory damages are available in Title IX cases in which intentional discrimination is alleged, this Court held that no notice problem arises, precisely because the violation is intentional. *See Franklin*, 112 S. Ct. at 1037. The instant cases likewise involve adjudicated or alleged acts of *intentional* discrimination, and the statutes at issue here, 42 U.S.C. §§ 1981 and 1981a, apply only to intentional discrimination. Thus, the respondents in the instant cases can have no more claim of "injustice" or "unfairness" in the availability to the petitioners of an effective remedy for intentional wrongdoing than did the defendants in *Franklin*. The Court properly rejected such a notion in *Franklin* and it should likewise do so here.[15]

In sum, *Bradley* demonstrates that there would be no "injustice," let alone "manifest" injustice, in applying the Civil Rights Act of 1991 to pending cases. Indeed, for all the reasons discussed in Sections I and II, *supra*, it would be manifestly unjust to continue to leave victims of intentionally unlawful conduct without an adequate

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[15] The fact that a prayer for compensatory damages would give a defendant the right to a jury trial or require "a retrial on damages before a properly instructed jury" does not implicate the "manifest injustice" exception to retroactivity. *See Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981).

remedy and permit the wrongdoers to escape without liability, or, even worse, with an order that their court costs be paid by their victims.

CONCLUSION

The decision of the Court of Appeals in each of these cases should be reversed and remanded.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENTS OF INDIVIDUAL *AMICI CURIAE*

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC strongly supported enactment of the Civil Rights Act of 1991 and believes that the amendments made by the Act are properly applied to litigation pending on the date of its enactment.

The Women's Legal Defense Fund (WLDF) is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. Throughout this work, WLDF has placed special emphasis on equal employment opportunity for women of color, who often face job discrimination based on both race and gender.

The American Association of University Women (AAUW) has promoted equity and education for women and girls since 1881. AAUW's 130,000 members are committed to achieving equal opportunities and fair treatment for women in the workplace.

The American Association of University Women Legal Advocacy Fund provides funding and a support system for women seeking judicial redress for sex discrimination. Since it was founded in 1981, the Legal Advocacy Fund has supported the lawsuits of more than 22 women

filing employment discrimination cases against institutions of higher education.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving and enhancing the fundamental civil rights and civil liberties embodied in the Constitution and civil rights laws of this country. In particular, the ACLU has long been involved in the effort to eliminate racial discrimination in our society. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of gender-based discrimination in our society. In pursuit of that goal, the ACLU has participated in numerous discrimination cases before this Court and worked for the passage of the Civil Rights Act of 1991.

The Americans for Democratic Action, a progressive, independent political organization, is a national coalition of civil rights and feminist leaders, academicians, business people and trade unionists, grass roots activists, elected officials, church leaders, professionals, members of Congress and many others.

The California Women's Law Center (CWLC) is a private, non-profit public interest law center specializing in the civil rights of women and girls. CWLC was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: sex discrimination, including sex discrimination in education, reproductive rights, family law, violence against women, child care, and discrimination in employment. The application of the Civil Rights Act of 1991 will have a far reaching impact on women who are currently pursuing their rights through the courts and who will be left without a remedy if the Civil Rights Act of 1991 is limited in its application.

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy

institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of more than 65 international unions. CLUW has 45 active chapters and a National Executive Board composed of the female leadership of these international unions. A primary purpose of this national coalition is to remove all forms of discrimination from the workplace.

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based public interest legal and education corporation dedicated to working through the legal system to secure equality for women. ERA has a long history of interest, activism, and advocacy in all areas of the law that affect equality between the sexes. Since its inception almost 20 years ago, ERA has specialized in litigating employment discrimination cases, many of which are Title VII cases. By extending the benefits of the Civil Rights Act of 1991 to pending cases, society will be able to move more quickly to end unfair treatment and assure equality to all of its citizens.

Federally Employed Women, Inc. (FEW) is an international non-profit organization representing over one million civilian and military women employed by the federal government. Since its inception in 1968, FEW's primary objective has been to eliminate sex discrimination and enhance career opportunities for women in government. Recognizing the need for full enforcement of Title VII of the Civil Rights Act of 1964, as amended, FEW strongly supported enactment of the Civil Rights Act of 1991 and remains committed to ensuring that the procedures and remedies under that statute are fully

available to all victims of employment discrimination, including those persons whose cases were pending on its effective date.

The Feminist Majority Foundation is a non-profit, 501(c)(3) research and education organization, which seeks to transform the public debate on issues of importance to women's lives, and to empower women through educational and research projects. The Foundation is committed to eradicating gender and racial discrimination and sexual harassment in the workplace and in all sectors of society.

The Japanese American Citizens League (JACL) is the largest Asian American civil and human rights organization in the United States, consisting of 113 chapters nationwide. Since its formation as a non-profit organization in 1929, JACL has participated, either as a party or as *amicus curiae*, in many legal actions that have challenged racial discrimination against Japanese Americans and other Asian Americans. It has also supported the passage of legislation aimed at eradicating discrimination based on race, national origin, gender, religion, sexual orientation and disabilities.

The National Committee on Pay Equity (NCPE) is a coalition of labor unions, women's and civil rights organizations working exclusively on the problems of wage discrimination against women and people of color. NCPE represents the interests of over 20 million working Americans and worked in coalition with other civil rights organizations to enact the Civil Rights Act of 1991. We feel strongly that the Civil Rights Act Amendments should apply to all cases pending on the date the legislation became law, not just to those concerning conduct after the date of enactment. This issue is vital to safeguarding the rights of workers and ensuring that the law consistently and thoroughly protects workers against discriminatory conduct at the hands of employers.

The National Council of Jewish Women (NCJW), founded in 1893, is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 500 communities nationwide dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. An active supporter of the Civil Rights Act of 1991 and its application to pending cases, the National Council of Jewish Women believes that individual liberties and rights guaranteed by the Constitution are keystones of a free and pluralistic society. Based on NCJW's *National Resolutions* stating our resolve to work for the "enforcement of sexual harassment laws and more stringent penalties for violators," we join this Brief.

The National Council of Negro Women, Inc. (NCNW) is a voluntary, community-based, non-profit membership organization founded in 1935. It has 33 National affiliate organizations and 250 community-based sections with an outreach to four million women. NCNW affirms its support of this *amicus* Brief in support of the application of the Civil Rights Act of 1991 to pending cases. As African American women, the issues of race discrimination and sexual harassment are of our utmost critical concern. Without application of the 1991 Act to pending cases, many victims of discrimination will be without recourse to address these egregious acts.

The National Organization for Women (NOW) is the nation's largest organization devoted to the advancement of women's rights, with over 280,000 members and more than 700 chapters in all 50 states and the District of Columbia. NOW has, since its inception, endorsed and promoted civil rights for all people. Hence, NOW actively worked for the passage of the Civil Rights Act of 1991 and supports its application to pending cases as an important element of full protection against employment discrimination.

The NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of the laws prohibiting employment discrimination, including *Robinson* v. *Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending* (11th Cir. argued Dec. 2, 1992).

The National Women's Conference Committee, appointed under Public Law 94-167 to implement the 1977 National Plan of Action for Women, is committed to address both sexual harassment (on which it has a national task force) and race discrimination (as addressed in the National Plan).

The National Women's Party was founded in 1913 by Suffragist Alice Paul, who was instrumental in passage of the 19th Amendment granting women the right to vote and who wrote the Equal Rights Amendment in 1923. Since the National Women's Party believes that all persons should be treated equally under the law regardless of gender, race or class, we join with the National Women's Law Center in support of applying the Civil Rights Act of 1991 to pending cases. Prevailing plaintiffs should be allowed a remedy for the discrimination they suffered and should not be deprived of a remedy because of the timing of the discrimination.

The Northwest Women's Law Center is a non-profit organization in Seattle, Washington, that works to advance the legal rights of women through litigation, education, and legislative advocacy, and by providing information and referrals to women with legal problems. One of the Law Center's priorities is the elimination of sex discrimination in employment. The Law Center has participated in several cases involving sex discrimination in employment before the United States Supreme Court, including *Price Waterhouse* v. *Hopkins* and *California Federal Savings & Loan Association* v. *Guerra*.

People For the American Way (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including supporting the enactment of the Civil Rights Act of 1991, participating in civil rights litigation, and conducting programs and studies directed at reducing problems of bias, injustice and discrimination.

The U.S. Section of the Women's International League for Peace & Freedom is pleased to join this Brief in support of the application of the Civil Rights Act of 1991 to pending cases. We have long worked to end inequity and discrimination of all kinds.

Women Employed is a national organization of working women, based in Chicago, with a membership of 2000. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination, especially in the area of sexual harassment. The organization has a long history of monitoring the performance of equal employment opportunity enforcement agencies, analyzing equal opportunity policies,

and developing detailed proposals for improving enforcement efforts.

The Women's Law Project (WLP) is a non-profit, feminist legal advocacy organization, located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past nineteen years, WLP's activities have included extensive work in the area of sex discrimination in employment. WLP has a strong interest in the eradication of sex and race discrimination in the workplace, and in the availability of the strong and effective remedies of the Civil Rights Act of 1991 to cases pending on the date of its enactment.

The YWCA of the U.S.A. is a national women's membership organization committed to the empowerment of women and the imperative to eliminate racism. Strengthened by diversity, the Association draws together members from varied economic, racial, ethnic, age, and religious groups who strive to create opportunities for women's growth, leadership and power. Because of our mission to obtain peace, justice, freedom and dignity for all people, we join as *amicus curiae* in support of the application of the Civil Rights Act of 1991 to cases pending on the date of its enactment.